Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-384

STEVEN A. TATERKA, *Petitioner,*

v.

WISCONSIN TELEPHONE COMPANY, *Respondent.*

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

FRED D. HUBER, JR.
722 North Broadway
Milwaukee, Wisconsin 53202

Counsel for Respondent
Wisconsin Telephone Company

Of Counsel:

A. T. BREIT
JOAN DALTON
722 North Broadway
Milwaukee, Wisconsin 53202

October 11, 1977

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OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Respondent, Wisconsin Telephone Company herein opposes the petition for a writ of certiorari filed by Steven A. Taterka on September 9, 1977.

QUESTIONS PRESENTED [1]

1. Whether an agreement between non-competing employers under which each of the parties agrees that it will not hire as new hires persons employed by the other parties while they are so employed or for six months thereafter violates Section 1 or Section 2 of the Sherman Act?

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[1] Despite Petitioner's assertions to the contrary, no question of standing is involved since standing was not denied by the lower courts.

2. Whether the trial court abused its discretion in refusing to permit the filing of a second amended complaint, which, like the original complaint and first amended complaint, failed to allege a cause of action?

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved in this case are those which appear at pp. 3-4 of the Petition.

STATEMENT OF THE CASE

This case is pleaded as an antitrust action in which the Plaintiff-Petitioner (hereinafter "Petitioner") Steven A. Taterka, after abandoning a cause of action pleaded under the Civil Rights Act of 1964, seeks to recover treble damages, pursuant to Section 4 of the Clayton Act, 15 U.S.C. § 15, allegedly caused by reason of violation by the Defendant-Respondent Wisconsin Telephone Company (hereinafter "Respondent") of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2. Respondent is a Bell System operating telephone company and does not compete with any other Bell System companies in any trade or commerce. The violation asserted is the alleged participation by Respondent in an agreement with other Bell System companies, with which it does not compete, to refrain from hiring employees of those other Bell System companies while they are so employed or for six months thereafter. No agreement affecting the respective employees or business of non-Bell System companies is claimed to exist between Respondent and any of its competitors or between Respondent and any other party. Nothing in the agreement as alleged precludes

any employee from employment in the Bell System for any period of time whatsoever, since the employee, should he or she leave and want to return in less than six months, can, under its terms, be hired back by the original Bell System employer. Also, in his amended and proposed second amended complaints[2] (App. A, pp. 1a-9a; Pet. App., pp. 1a-8a), Petitioner admits that procedures are employed in the Bell System enabling employees to transfer from one Bell System company to another (Pet. App., pp. 3a-4a, para. 8).

Petitioner filed his original complaint in the United States District Court for the Eastern District of Wisconsin on December 24, 1974 alleging that the agreement described above, a "no-switching" agreement, in and of itself violated the Sherman Act. Considering matters outside the pleadings and treating Respendent's motion to dismiss as a motion for summary judgment, the District Court granted the motion. It ruled that Petitioner had alleged only a no-switching agreement and had failed to allege that competion was impaired, that any trade or commerce was affected, or that any underlying anti-competitive agreement was implemented by that agreement or that a contract was made or conspiracy existed between competitors (Pet. App., pp. 21a-23a).

[2] The Petitioner's first question presented to this Court apparently challenges the propriety of the dismissal of his first amended complaint although that complaint alleged, as a second cause of action, a violation of Section 1 of the Sherman Act only and not Section 2 of that Act. No copy of that complaint was included in Petitioner's brief. The Respondent has therefore submitted a copy for the Court's reference, which appears as Appendix A, pp. 1a-20a. The first cause of action in that amended complaint, relating to a charge of discrimination, has been abandoned.

Taking advantage of an opportunity afforded by the District Court, Petitioner filed his amended complaint claiming that the alleged agreement interfered with employee mobility, increased prices and restricted the freedom of the parties thereto to hire. Respondent again moved to dismiss and on March 5, 1976 the District Court granted the motion and dismissed the action, ruling that Petitioner complained of employment practices, not any restraint of trade (Pet. App., pp. 18a-20a).

Petitioner then moved to vacate the judgment of March 5, 1976 and for leave to file his second amended complaint. That proposed complaint was submitted with his motion and the motion was denied on June 29, 1976. Petitioner appealed from the order dismissing his first amended complaint and from the order denying his motion to vacate judgment and to file his second amended complaint. On May 4, 1977, the United States Court of Appeals for the Seventh Circuit affirmed the orders appealed from in a six page unpublished order (Pet. App., pp. 10a-16a).

On May 21, 1977, Petitioner submitted a petition for rehearing in *banc* to the Court of Appeals raising the same questions of conflict between the Court of Appeals for the Seventh Circuit and the decisions of the United States Supreme Court and the Court of Appeals for the Second Circuit as he raises on Page 8 of the Petition for Writ of Certiorari (App. B, pp. 21a-26a). On May 29, 1977 he wrote to the Honorable Thomas E. Fairchild, Chief Judge of the Court of Appeals for the Seventh Circuit, calling his attention to the pendency of the petition for rehearing and stressing a portion of the argument (App. C, p. 27a).

That petition was denied on June 14, 1977 (Pet. App., p. 17a).

On June 2, 1977, Petitioner submitted a motion to the Court of Appeals asking that the unpublished order of May 4, 1977 be published pursuant to Circuit Rule 35(c) of the Seventh Circuit[3] (App. D, pp. 29a-30a). The motion was denied on June 13, 1977.

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[3] (c) Guidelines for Method of Disposition.

(1) Published opinions:

Shall be filed in signed or per curiam forum in appeals which

(i) Establish a new or change an existing rule of law;
(ii) Involve an issue of continuing public interest;
(iii) Criticize or question existing law;
(iv) Constitute a significant and non-duplicative contribution to legal literature
  (A) by a historical review of law;
  (B) by describing legislative history; or
  (C) by resolving or creating a conflict in the law; or
(v) Reverse a judgment or deny enforcement of an order when the lower court or agency has published an opinion supporting the order.

(2) Unpublished orders:

(i) May be filed after an oral statement of reasons has been given from the bench and may include only, or little more than, the judgment rendered in appeals which
  (A) are frivolous or
  (B) present no question sufficiently substantial to require explanation of the reasons for the action taken such as where
    (aa) a controlling statute or decision determines the appeal;
    (bb) issues are factual only and judgment appealed from is supported by evidence;
    (cc) order appealed from is nonappealable or this court lacks jurisdiction or appellant lacks standing to sue; or
(ii) May contain reasons for the judgment but ordinarily not a complete nor necessarily any statement of the facts, in appeals which
  (A) are not frivolous but

REASONS FOR OPPOSING THE WRIT

By issuing its decision as an unpublished order, and by denying Petitioner's petition for rehearing and motion for publication of order, the Court of Appeals has deliberately determined that this case does not involve an issue of continuing public interest: does not establish a new or change an existing rule of law; does not resolve or create a conflict in the law; and only presents arguments concerning the application of recognized rules of law. After a careful review of the record and those recognized rules (as its May 4, 1977 order reveals) the Court of Appeals determined that, far from involving important issues of a type which might warrant the attention of the United States Supreme Court, this case actually involves no issues the resolution of which is significant enough, under its Rule 35(c) to constitute a contribution to legal literature.

A review of the pleadings and opinions in this case confirms that there are no issues of any significance beyond the interests of the parties hereto. The District Court and Court of Appeals only dealt with allegations that an employee of one Bell System company who could have attempted, but did not attempt to transfer to another Bell System company was injured, because he could not, under an alleged agreement, apply for employment with that other company as a new hire. Respondent urges that this limited personal claim does not merit consideration by the United States Supreme Court for any special and important reasons.

(B) present arguments concerning the application of recognized rules of law, which are sufficiently substantial to warrant explanation but are not of general interest or importance.

I

THE PETITION SHOULD BE DENIED BECAUSE THE SEVENTH CIRCUIT COURT OF APPEALS DECISION IN THIS CASE DID NOT DECIDE A FEDERAL QUESTION IN A MANNER WHICH CONFLICTED WITH THE DECISIONS OF THE UNITED STATES SUPREME COURT IN *RADOVICH* V. *NATIONAL FOOTBALL LEAGUE*, 352 U.S. 445 (1957), AND *ANDERSON* V. *SHIPOWNERS' ASS'N OF PACIFIC COAST*, 272 U.S. 359 (1926).

That the United States Court of Appeals for the Seventh Circuit is fully aware of the rules of law proclaimed in the *Radovich* and *Anderson* cases and will apply those rules in a proper case is established not only by its ruling in this case, but also by its earlier decision in *Nichols* v. *Spencer International Press, Inc.*, 371 F.2d 332 (7th Cir. 1967). After considering the *Radovich* and *Anderson* decisions, the Circuit Court held in *Nichols* that a no-switching agreement between competing employers was actionable in a suit under the Sherman Act by an employee who alleged a substantive violation of the antitrust laws.

In this case, the Court of Appeals merely held that an alleged no-switching agreement between noncompeting employers is not actionable in a suit under the Sherman Act by an employee who fails to allege a reasonably foreseeable, nonspeculative effect of that agreement on any trade or commerce or on business competition. Nothing in that ruling contradicts or conflicts with the *Radovich* or *Anderson* cases. On the contrary, the ruling is the only reasonable interpretation of those cases, given the fact that the Sherman Act was enacted to protect trade and commerce and commercial competition. *Northern Pac. Ry. Co.* v. *United States*, 356 U.S. 1 (1958); *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469 (1940).

II

THE PETITION SHOULD BE DENIED BECAUSE NO CONFLICT EXISTS BETWEEN THE DECISION OF THE SEVENTH CIRCUIT COURT OF APPEALS IN THIS CASE AND THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT IN *UNION CIRCULATION* CO. V. *FTC.* 241 F.2d 652 (1957), AS THE QUESTIONS INVOLVED IN THE TWO CASES ARE DIFFERENT

As with *Radovich* and *Anderson,* the Court of Appeals has demonstrated its knowledge of and respect for the decision of the Second Circuit in the *Union Circulation* case, not only in its decision in this case, but in its prior decision in *Nichols.* Unlike this case, *Nichols* and *Union Circulation* both involved no-switching agreements between competitors. As the Court of Appeals noted in its May 4, 1977 order, in *Union Circulation* the possible effect of the challenged agreement on newly-formed nonparty competitors could reasonably be foreseen as harmful. In contrast, the possible effects of the alleged agreement challenged in this case are speculative, particularly when the minimal time impact of that agreement and the affected employees' freedom to return to their original Bell System employers are considered.

The *Union Circulation* ruling was not rejected by the Court of Appeals decision in this case, but was properly distinguished.

III

THE PETITION SHOULD BE DENIED BECAUSE THE REFUSAL BY THE DISTRICT COURT TO VACATE JUDGMENT AND PERMIT THE FILING OF A SECOND AMENDED COMPLAINT WAS NOT AN ABUSE OF DISCRETION

Neither *Foman* v. *Davis,* 371 U.S. 178 (1962), nor *Austin* v. *House of Vision, Inc.,* 385 F.2d 171 (7th Cir. 1967), both relied upon by Petitioner, warrants or supports the conclusion that Petitioner was entitled to file a second amended complaint. Further, no prejudice resulted to Petitioner by reason of the District Court's refusal to vacate judgment and permit that filing.

In *Foman, supra* 371 U.S. at 182, this Court specifically recognized the validity of several reasons for denying leave to amend a complaint. Two of these reasons present here—repeated failure to cure deficiencies by amendments previously allowed and the futility of the amendment, justify the denial of leave to amend in this case.

The May 4, 1977 Order of the Court of Appeals discussed the failure of Petitioner to cure defects in his original and amended complaints in the light of *Foman* and properly held that that failure warranted the denial of leave to file a second amendment. Additionally, the Court of Appeals, unlike the Court in *Austin,* had a full opportunity to, and did, test the proposed second amendment for futility and ruled that it, too, like the original and amended complaints, was deficient. In *Austin,* the Court was unable to apply that test, since the proposed amended complaint had not been submitted to the District Court

when leave to amend was sought.[4] Unlike the Court of Appeals order in this case, no discussion of the merits of the proposed amendment was contained in the 1967 *Austin* opinion.

In denying Petitioner's motion to vacate judgment to permit the filing of a second amended complaint, both the District Court and the Court of Appeals examined the allegations of his proposed amendment and found them wanting. Under those circumstances, the claimed procedural defect is of no import.

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[4] This fact is clearly revealed by the Court of Appeals statement (385 F.2d at 172):

> "Whether such an amended complaint will state a cause of action cannot be determined unless and until such an amended complaint is filed and tested."

and by its statement on a subsequent appeal, *Austin* v. *House of Vision, Inc.*, 404 F.2d 401 (7th Cir. 1968):

> "On remand, the district court granted such leave and plaintiff filed his second amended complaint. On consideration thereof, the trial court granted defendants' motion to dismiss and the second amended complaint was dismissed." (*id.* at 401-02.)

CONCLUSION

Petitioner was given adequate opportunity to attempt to plead a cause of action under the Sherman Act in the District Court. His failures in that respect under proper interpretations of existing law have been accurately enunciated by both the District Court and the Court of Appeals, and the deficiencies in his proposed further amended pleading in the light of existing law have been fully described by the Court of Appeals. That Court has determined and an analysis of the pleadings and of the law confirms that this case involves no issues of interest or importance to persons other than the parties.

We therefore ask that the Petition for Writ of Certiorari be denied for the reasons stated herein.

Respectfully submitted,

FRED D. HUBER, JR.
722 North Broadway
Milwaukee, Wisconsin 53202

Counsel for Respondent
Wisconsin Telephone Company

Of Counsel:

A. T. BREIT
JOAN DALTON
722 North Broadway
Milwaukee, Wisconsin 53202

October 11, 1977

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Civil Action No. 74 C 625

STEVEN A. TATERKA, *Plaintiff*,

v.

WISCONSIN TELEPHONE COMPANY, *Defendant*.

Amended Complaint

(FILED AUGUST 1, 1975)

The plaintiff, complaining of the defendant, alleges as follows:

FIRST CAUSE OF ACTION

1. This action is brought to annul and set aside a determination of the Equal Employment Opportunity Commission arising from a charge of discrimination brought by charging party, plaintiff in this action, against respondent, defendant in this action issued on September 26, 1974. A copy of said charge of discrimination, marked "Exhibit A", and a copy of said determination, marked "Exhibit B", are attached to this complaint. The jurisdiction of this Court is invoked under Title VII of the Civil Rights Act of 1964, as amended, 78 Stat. 253 (Title 42, United States Code, Section 2000e et seq.).

2. The defendant is a corporation organized under the laws of the state of Wisconsin with its principal offices located at 722 North Broadway, Milwaukee, Wisconsin. At all times mentioned herein the defendant operated within the state of Wisconsin within the territorial jurisdiction of this Court.

3. The defendant is an employer within the meaning of Title 42, United States Code, Section 2000e-(b) and is engaged in an industry affecting commerce within the meaning of Title 42, United States Code, Section 2000e-(h).

4. The plaintiff is an adult white male citizen of the United States and a resident of the state of Wisconsin. From November, 1970 to October, 1972, he was employed as a switchman with New York Telephone in what is known in the telephone trade as the number 5 crossbar switching system. While employed during that period the plaintiff successfully completed a three (3) month training course as required by New York Telephone. The plaintiff resigned from New York Telephone in October, 1972 and was in good standing with that company at that time. By virtue of his training and experience the plaintiff is duly qualified to perform the duties of a switchman in a number 5 crossbar switching system.

5. On December 1, 1972 the plaintiff, after having resigned his employment with New York Telephone, went to the employment office of the defendant for the purpose of obtaining employment as a switchman. He filled out an application for employment which was subject to a six (6) month waiting period as set forth in paragraph 18 of this complaint.

6. The position of switchman within the defendant company is predominantly staffed by white males. Under the defendant's hiring policies as specified in paragraph 8 of this complaint, the plaintiff has been, and is, ineligible for employment in the position of switchman solely on account of his race and sex in violation of Title VII of the Civil Rights Act of 1964, Section 703(a)(1), 78 Stat. 255 (Title 42, United States Code, Section 2000e-2(a)(1) and Section 703(j), 78 Stat. 257 (Title 42, United States Code, Section 2000e-2(j).

7. On January 18, 1973 the American Telephone and Telegraph Company, on behalf of itself and its associated Bell System telephone companies, and the Equal Employment Opportunity Commission (hereinafter EEOC) and the United States Department of Labor entered into a consent decree, civil action number 73-149 in the United States District Court for the Eastern District of Pennsylvania. Attached to the consent decree as appendices A, B and C respectively, and made a part thereof, were American Telephone and Telegraph Company's Model Affirmative Action Program, Upgrading and Transfer Plan and Job Briefs and Qualifications; such appendices are collectively referred to as the "Model Programs". The consent decree is to remain in effect until January 18, 1979.

8. The Consent Decree, together with the "Model Programs" specifies goals and timetable requirements based on race and sex that Bell System companies, including the defendant, must meet. In keeping with these requirements the defendant is attempting to achieve a proportionate representation of its work force, on the basis of race and sex, with that of the population of the surrounding area in which the defendant operates. The defendant is attempting to do this in each of the fifteen (15) Affirmative Action Program Job Classifications defined in American Telephone and Telegraph Company's Affirmative Action Program. Until the defendant achieves a proportionate representation of its work force in the job classification of switchman, on the basis of race and sex, with that of the population in the surrounding area, the plaintiff will continue to be ineligible for employment with the defendant as a switchman. To date, the plaintiff has not been offered employment of any kind with the defendant.

9. On April 8, 1974 the plaintiff filed a charge of discrimination with the EEOC. A copy of said charge of

discrimination, marked "Exhibit A" is attached to this complaint.

10. On September 26, 1974 the EEOC issued a determination dismissing plaintiff's charge of discrimination for 'no reasonable cause". A copy of said determination, marked "Exhibit B" is attached to this complaint.

11. On September 26, 1974 the EEOC issued a notice of right to sue to the plaintiff. A copy of said notice, marked "Exhibit C" is attached to this complaint.

12. By virtue of the unlawful acts of the defendant, the plaintiff has suffered damage in an amount equal to wages for the position of switchman from December 1, 1972 to the present.

SECOND CAUSE OF ACTION

13. This action arises under the Sherman Antitrust Act of July 2, 1890, c.647, 26 Stat. 209, as amended (Title 15, United States Code, Sections 1-7) and the Clayton Antitrust Act of October 15, 1914, c.323, 38 Stat. 730, as amended (Title 15, United States Code, Section 12 et seq.)

14. The defendant is a corporation organized under the laws of the state of Wisconsin with its principal offices located at 722 North Broadway, Milwaukee, Wisconsin. At all times mentioned herein the defendant operated within the state of Wisconsin within the territorial jurisdiction of this Court.

15. The defendant is, and at all times mentioned herein was, engaged in the business of providing communication services. As such, the defendant was engaged in interstate commerce.

16. The acts and conduct of the defendant and the defendant's co-conspirators hereafter referred to constitute a conspiracy in restraint of trade and commerce among the several states in violation of Section 1 of the Sherman Act (Title 15, United States Code, Section 1).

17. At all times mentioned herein the plaintiff's occupation was that of a switchman in what is known in the telephone trade as a number 5 crossbar switching system. The plaintiff was employed in that capacity with the New York Telephone Company during the period November, 1970 to October, 1972 at which time he resigned. While employed during that period, the plaintiff successfully completed a three (3) month training course as required by New York Telephone.

18. At all times mentioned herein the defendant, which is known as a Bell System company, and the co-conspirators named in paragraph 19 of this complaint, which are also known as Bell System companies, gave force and effect to an agreement imposing restrictions on employment (hereinafter referred to as the no switching agreement). Under the no switching agreement, Bell System companies would not hire persons employed by other Bell System companies while still employed by such other Bell System companies or for a period of six (6) months thereafter. While there did exist a procedure by which Bell System employees might transfer from one Bell System company to another, such procedure was subject to approval of both the Bell System company an employee wished to transfer to and the Bell System company he wished to transfer from. A refusal by a current Bell System employer to grant approval precluded the possibility of a transfer. An employee of a Bell System company who did not, or for any reason could not, avail himself of the transfer procedure was unable to secure employment with another Bell System company within six (6) months of resigning his Bell System employment due to adherence to the no switching agreement by the defendant and named co-conspirators. The no switching agreement was aimed at the plaintiff, and others similarly situated, and enabled the defendant and named co-conspirators, by virtue of their dominant position in the telephone field, to exercise great control over the mobility of their employees.

19. Various corporations, not named as defendants herein, participated as co-conspirators with the defendant in the conspiracy charged herein. These corporations, generally known as Bell System companies, include the following:

American Telephone and Telegraph Company

New England Telephone and Telegraph Company

The Southern New England Telephone Company

New York Telephone Company

New Jersey Bell Telephone Company

The Bell Telephone Company of Pennsylvania

The Diamond State Telephone Company

The Chesapeake and Potomac Telephone Company

The Chesapeake and Potomac Telephone Company of Maryland

The Chesapeake and Potomac Telephone Company of Virginia

The Chesapeake and Potomac Telephone Company of West Virginia

Southern Bell Telephone and Telegraph Company

South Central Bell Telephone Company

The Ohio Bell Telephone Company

Cincinnati Bell Inc.

Michigan Bell Telephone Company

Indiana Bell Telephone Company, Inc.

Illinois Bell Telephone Company

Northwestern Bell Telephone Company

Southwestern Bell Telephone Company

The Mountain States Telephone and Telegraph Company

Pacific Northwest Bell Telephone Company

The Pacific Telephone and Telegraph Company

Bell Telephone Company of Nevada.

20. During the month of July, 1971 the plaintiff, while still in the employ of New York Telephone, attempted to obtain employment with the defendant as a switchman. Plaintiff, unable to work at that time due to a strike then being waged against New York Telephone, presented himself at the employment office of the defendant whereupon, pursuant to the no switching agreement alleged in paragraph 18 of this complaint, defendant's employment representative refused to permit the plaintiff to fill out an application for employment.

21. On December 1, 1972 the plaintiff, after having resigned his employment with New York Telephone, again attempted to obtain employment with the defendant as a switchman. At that time, the plaintiff was permitted to fill out an application for employment; however, such application was subject to the six (6) month waiting period required by the no switching agreement.

22. As a direct result of the defendant's adherence to the no switching agreement, the plaintiff was precluded from employment with the defendant:

(a) during the time he was still employed with New York Telephone;

(b) for the six (6) month period beginning October, 1972 when he resigned from New York Telephone and;

(c) suffered loss of employment which would have continued from the time periods stated in (a) and

(b) had the plaintiff not been barred during those periods.

The plaintiff has therefore suffered loss of wages for the position of switchman with defendant from July, 1971 to the present.

23. The defendant is the dominant telephone company in the state of Wisconsin operating approximately seventy-two percent (72%) of the telephones in the state. Because of the defendant's dominant position, the plaintiff was effectively precluded from pursuing his occupation in the state of Wisconsin and thereby suffered injury to his business and property within the meaning of Section 4 of the Clayton Act (Title 15, United States Code, Section 15).

24. By adherence to the no switching agreement, the defendant and named co-conspirators imposed restrictions on their freedom to hire personnel. As such, they put themselves into a situation of restraint upon their ability to carry on interstate commerce.

25. As a further result of the defendant's adherence to the no switching agreement, the defendant has had to train inexperienced personnel for the position of switchman rather than employing those already trained. This has resulted in increasing training costs being borne by the defendant and, consequently, higher prices to the telephone using public.

Wherefore, plaintiff prays:

FIRST CAUSE OF ACTION

That the defendant be enjoined from further implementation of the Consent Decree specified in paragraph 7 of this complaint.

That the amount of damages plaintiff has sustained by reason of the unlawful acts of the defendant be ascertained

and assessed according to defendant company's wage scales for the position of switchman from December 1, 1972 to the present and defendant company be ordered to pay to the plaintiff such amount.

That the plaintiff recover such other amounts and have such other and further relief as the Court shall deem just.

SECOND CAUSE OF ACTION

That the herein alleged no switching agreement between the defendant and named co-conspirators be adjudged and decreed to be an unreasonable restraint of interstate trade and commerce in violation of Section 1 of the Sherman Act (Title 15, United States Code, Section 1).

That the amount of damages plaintiff has sustained by reason of the unlawful acts of the defendant be ascertained and assessed according to defendant company's wage scales for the position of switchman from July, 1971 to the present and the defendant be ordered to pay to the plaintiff three (3) times the amount of such damages as provided by Section 4 of the Clayton Act (Title 15, United States Code, Section 15).

That the plaintiff recover such other amounts and have such other and further relief as the Court shall deem just.

/s/ STEVEN A. TATERKA
Steven A. Taterka
Plaintiff pro se
8340 North Regent Road
Milwaukee, Wisconsin
414 352-6021

Exhibit A

(Please Print or Type)

CHARGE OF DISCRIMINATION

EEOC Charge No.—TMK 4-1055

Form Approved OMB No.—124-R0001

Instructions

If you have a complaint, fill in this form and mail it to the Equal Employment Opportunity Commission's District Office in your area. In most cases, a charge must be filed with the EEOC within a specified time after the discriminatory act took place. It is therefore important to file your charge as soon as possible. *(Attach extra sheets of paper if necessary.)*

Cause of Discrimination

☒ Race or Color ☒ Sex
☐ Religious Creed
☐ National Origin

Name *(Indicate Mr. or Ms.)*—Mr. Steven A. Taterka

Street Address—200 West 80th St., Apt. 9M

County—New York

City, State, and Zip Code—New York, New York 10024

Date of Birth—July 17, 1948

Social Security No.—076-38-6714

Telephone No. *(Include area code)*—212 874-2932/799-7819

The Following Person Always Knows Where To Contact Me

Name *(Indicate Mr. or Ms.)*—Mr. Luis R. Hernandez

Street Address—9745 West Beatrice St., Apt. 4

City, State, and Zip Code—Milwaukee, Wi. 53224

Telephone No. *(Include area code)*—414 355-5693

List the Employer, Labor Organization, Employment Agency, Apprenticeship Committee, State or Local Government Who Discriminated Against You
(If more than one, list all)

Name—Wisconsin Telephone Company

Telephone No. (Include area code)—414 393-9300

Street Address—722 North Broadway

City, State, and Zip Code—Milwaukee, Wi. 53203

Others Who Discriminated Against You—[blank]

Charge Filed with State/Local Gov't. Agency—
☐ Yes ☒ No

Date Filed—[blank]

Agency Charge Filed with *(Name and address)*—[blank]

Approximate No. of Employees/Members of Company or Union This Charge Is Filed Against—[blank]

DATE MOST RECENT OR CONTINUING DISCRIMINATION TOOK PLACE *(Month, day, and year)*—April, 1974

Explain what unfair thing was done to you and how other persons were treated differently. Understanding that this statement is for the use of the United States Equal Employment Opportunity Commission, I hereby certify:

Please see attached sheets.

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

DATE—4/8/74

CHARGING PARTY *(Signature)*—Steven A. Taterka

Subscribed and sworn to before this EEOC representative.
DATE—[blank] SIGNATURE AND TITLE—[blank]

NOTARY PUBLIC

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE

(Day, month, and year)—8th April 1974

SIGNATURE *(If it is difficult for you to get a Notary Public to sign this, sign your own name and mail to the District Office. The Commission will notarize the charge for you at a later date.)*

/s/ Joan D. Beaumont

From November, 1970 to October, 1972 I was employed as a switchman with the New York Telephone Company. This position, also known as central office repairman, involves the maintenance and repair of telephone company central office switching equipment. The type of system I have experience with is known in the trade as the Number 5 Crossbar switching system.

Of the total time I was employed by New York Telephone, three months were spent in a Bell System training course to learn the operation of the system involved; this included two months of classroom instruction and one month of field training.

During October, 1972 I voluntarily resigned my position with New York Telephone. Having lived in Milwaukee previously, my intention was to return and seek similar employment with the Wisconsin Telephone Company.

Prior to resigning, however, I had gone to the Wisconsin Telephone Company employment office (845 North 35 Street, Milwaukee) to inquire about working for the company; this was in July, 1971 during a prolonged strike against New York Telephone. I was told that if my work record from New York Telephone was satisfactory I would probably be hired when a vacancy existed for one with my (Number 5 Crossbar) experience. However, I was not permitted to file an application for employment at that time because Bell System companies did not accept applications from individuals currently employed by other Bell System companies; at the time I was still employed by New York Telephone, a Bell company. In addition, I was told that Wisconsin Telephone would not hire me for a period of six months following my resignation from New York Telephone because of an agreement that then existed between Bell System companies pertaining to Bell employees who did not transfer through regular company channels. A transfer would have been extremely difficult

at the time due to the strike then being waged against New York Telephone.

In November, 1972, shortly after resigning from New York Telephone, I filled out an application for employment with Wisconsin Telephone. At the time I was told I would be contacted if anything became available. Since that time I have inquired at Wisconsin Telephone's employment office several times about the status of my application and, to date, have not been offered employment of any kind with the company.

I have been told by the company that my not being hired is a result of the agreement worked out in January, 1973 between the Equal Employment Opportunity Commission and the American Telephone and Telegraph Company on behalf of all Bell System companies. According to Wisconsin Telephone, the agreement requires that the company increase minority and female representation in the company work force to ratios reflecting minority and female representation in the general population of the Milwaukee area; the company says this must be accomplished in each job classification. Therefore, because minority and female representation is insufficient in the job classification for which I am applying (switchman), and because I do not fall into one of these two underrepresented groups, I am currently ineligible for this position.

While the company has not specifically stated it is filling each job classification on the basis of a quota system, this apparently is the case. Further, I was told that the company makes an annual report to the Milwaukee district office of the Equal Employment Opportunity Commission specifying progress made in increasing minority and female representation within each job classification.

Wisconsin Telephone has indicated that my work record from New York Telephone does not contain anything which would prevent employing me. To the contrary, I was told

by the company that my work record is in order. To the best of my knowledge, Wisconsin Telephone is not questioning my ability to work as a switchman.

While I was employed by New York Telephone I was told by Wisconsin Telephone that I could not be employed then, or for a period of six months thereafter, because I was at the time employed by a Bell System company. Now, having resigned from New York Telephone, I am told that preference must first be given to Bell System employees and I no longer work for Bell.

Having resigned from New York Telephone on the basis of what I was told by Wisconsin Telephone in July, 1971, I am now confronted with a completely different employment situation. This imposes a hardship on me in that time spent learning Bell System circuits is wasted because the skill involved is not marketable anywhere other than at a telephone company.

Exhibit B

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
342 North Water Street
Milwaukee, Wisconsin 53202
Telephone: 224-1111

September 26, 1974

In Reply Refer To:

Case No: YMK5-029
Charge No: TMK4-1055

Mr. Steven A. Taterka
200 West 86th Street
Apartment Number 9-M
New York, New York 10024

Charging Party

vs.

Wisconsin Telephone Company
722 North Broadway
Milwaukee, Wisconsin 53202

Respondent

Determination

It is undisputed that the Respondent Employer and the Commission entered into a Consent Decree, dated January 18, 1973 Civil Action Number 73-149, encompassing the issues contained in Charging Party's charges and that pursuant to the decree members of the aggrieved classes were to be identified and awarded appropriate relief. The aggrieved classes were determined to include only certain females and minority group employees of Respondent. Those persons found to have been aggrieved are now receiving their respective remedial relief pursuant to the Bell System upgrade and transfer plan, effective June, 1973,

Charging Party, a White male, alleges that he is being denied said relief because of his race and/or sex.

In a recent case involving a Consent Decree entered into between the Department of Justice and Libby, Owens, Ford Company, The Court, in considering the "loss" to males stated as follows:

> "However, certain fundamentals must be understood. A system which discriminates against some individuals necessarily discriminates in favor of others. The only way that the discrimination against some can be eliminated is to eliminate also that which is in favor of the others. This does not mean that the tables are turned so that the former underdog is now top dog, and vice versa, but only that in the future there will be neither. Necessarily, however, the one who was formerly in a favored position will no longer be so favored, and thus may well suffer some loss. The loss, however, is only of that privilege or benefit to which the loser was not justly entitled." *U.S.* v. *Libby Owens-Ford, Inc.* 3 EPD 8122 (D.C. Ohio 1971).

We believe the same rationale applies here and conclude that there is no reasonable cause to believe that Charging Party and other similarly situated White males have been discriminated against because of their race and/or sex as alleged.

Date: September 26, 1974.

On behalf of the Commission:

/s/ WESLEY N. HARRY
Wesley N. Harry
District Director

Exhibit C

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

NOTICE OF RIGHT TO SUE

To: Mr. Steven A. Taterka
200 West 86th Street
Apartment Number 9-M
New York, New York 10024

FROM: Milwaukee District Office
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
342 North Water Street—6th Floor
Milwaukee, Wisconsin 53202

THIS CHARGE HAS BEEN DISMISSED FOR THE FOLLOWING REASON:

- ☒ No Reasonable Cause
- ☐ No Jurisdiction
- ☐ Untimely Charge
- ☐ Failure to Proceed

EEOC REPRESENTATIVE—Nelson G. Alston, District Counsel

TELEPHONE NUMBER—414/224-1111

CASE/CHARGE NUMBER—YMK5-029/TMK4-1055

If you want to pursue your charge further, you have the right to sue the respondent(s) named in this case in the United States District Court for the area where you live. If you decide to sue, you must do so within ninety (90) days from the receipt of this Notice; otherwise your right is lost.

If you do not have a lawyer or are unable to obtain the services of a lawyer, take this Notice to the United States District Court which may, in its discretion, appoint a lawyer to represent you.

An information copy of this Notice has been sent to the respondent(s) named in this case.

If you have any questions about your legal rights or need help in filing your case in court, call the EEOC representative named above.

/s/ WESLEY N. HARRY
Wesley N. Harry
District Director

cc: Wisconsin Telephone Company
Milwaukee, Wisconsin 53202

(Charging Party's Copy)

(EEOC Form 161—Apr 73)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Civil Action No. 74-C-625

STEVEN A. TATERKA, *Plaintiff*,

v.

WISCONSIN TELEPHONE COMPANY, *Defendant*

CERTIFICATE OF SERVICE

I, Steven A. Taterka, plaintiff in the above entitled action, certify that on July 31, 1975 I served the attached amended complaint upon counsel for the defendant by mailing a copy, postage prepaid, to Mr. Douglas Reed, Wisconsin Telephone Company, Room 1608, 722 North Broadway, Milwaukee, Wisconsin 53202.

/s/ STEVEN A. TATERKA
Steven A. Taterka
Plaintiff pro se
8340 North Regent Road
Milwaukee, Wisconsin 53217
414 352-6021

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 76-1888

STEVEN A. TATERKA, *Plaintiff-Appellant*,

v.

WISCONSIN TELEPHONE COMPANY, *Defendant-Appellee.*

APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN GRANTING DEFENDANT'S MOTION TO DISMISS IN CIVIL ACTION NO. 74-C-625

Petition for Rehearing In Banc

STEVEN A. TATERKA
Plaintiff pro se

P.O. Address:
200 West 86th St. # 9M
New York, N.Y. 10024

PETITION FOR REHEARING

Plaintiff-appellant, Steven A. Taterka, pursuant to Rule 40, Federal Rules of Appellate Procedure, respectfully petitions the Court for a rehearing in this cause for the reason that in affirming the judgment of the District Court, this Court has overlooked certain points of law as hereinafter set forth.

Suggestion of Rehearing In Banc
(per Circuit Rule 16(b))

Plaintiff-appellant, pursuant to Rule 35, Federal Rules of Appellate Procedure, suggests a rehearing in banc because:

a) The employment practice challenged in this action is engaged in by the Bell System, one of the nation's largest employers; and

b) The panel order is in conflict with the following decisions:

Radovich v. *National Football League,* 352 U.S. 445 (1957)

Union Circulation Co. v. *FTC,* 241 F.2d 652 (2 Cir. 1957)

Nichols v. *Spencer International Press, Inc.,* 371 F.2d 332 (7 Cir. 1967)

Statement of the Case

Plaintiff-appellant incorporates, by reference, the statement of the case set forth in plaintiff-appellant's principal brief at pages 2-6.

Issues Presented

Plaintiff-appellant incorporates, by reference, the statement of the issues presented in plaintiff-appellant's principal brief at page 1.

Argument

I

The Court Does Not Consider The Extent To Which The No-Switching Agreement Constitutes A Restraint Upon The Ability Of Bell System Operating Companies To Engage In Interstate Commerce

The Court concludes that because the parties to the no-switching agreement are not business competitors of one another in the usual sense, the agreement does not restrain business competition. In doing so the Court overlooks the extent to which American Telephone & Telegraph Company, the parent company of the Bell System, imposes adherence to the no-switching agreement upon the individual operating companies and thus restrains their freedom to engage in interstate commerce.

Competition for employees, insofar as it effects a business' ability to function, is no different than competition for anything else necessary to turn out a product or service; this has been demonstrated in cases in which employment contract provisions imposing unreasonable restrictions on an employee's right to work for another employer have been found violative of the Sherman Act. Thus the effect of the no-switching agreement upon the business of supplying telephone service is analogous to the restraint upon supplying reference books which this Court found actionable in *Nichols.* This is entirely consistent with the Supreme Court's decision in *Anderson* v. *Shipowners' Ass'n of Pacific Coast,* 272 U.S. 359 (1926) where the court found that shipowners who had agreed to a limitation on their right to hire employees had "put themselves into a situation of restraint upon their freedom to carry on interstate and foreign commerce" in violation of the Sherman Act. *Id* at 365. Bell System companies should not be immune from what is otherwise an illegal practice simply because they have government granted monopolies to operate in specified geographical areas.

II

THE COURT HAS MADE A DETERMINATION AS TO THE FACTUAL VALIDITY OF PLAINTIFF'S ANTI-COMPETITIVE ALLEGATIONS AND THUS EXCEEDED THE SCOPE OF REVIEW IN DETERMINING WHETHER A COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM.

In dealing with plaintiff's allegations that non-Bell operating companies and competing interconnect companies are placed at a competitive disadvantage because of the no-switching agreement, the Court concludes that such allegations are too speculative to support an antitrust action. The Court reaches this result stating that a Bell System employee contemplating going to a non-Bell company "does not appear" to face a substantial risk of being out of work within six months and precluded from further Bell System employment. This conclusion, itself speculative, is a factual determination that does not take into account the extent to which a Bell System employee perceives the risk since that is enough to prevent him from seeking employment with a non-Bell company. The Court has thus engaged in fact finding with respect to plaintiff's allegations of anticompetitiveness when the question is only whether or not the complaint states a cause of action.

In *Nichols* this Court held that the effects of the no-switching agreement were *not, as a matter of law,* so negligible that the agreement was not in restraint of trade. 371 F.2d at 337. Accordingly, the case was remanded for a determination as to whether the agreement was, in fact, in restraint of trade. In the instant case the Court, by concluding that the anticompetitive effects on non-Bell operating companies and competing interconnect companies alleged are speculative, has made the very determination that it directed the district court in *Nichols* to make on remand.

Addressing similar allegations as to the effects of a no-switching agreement upon those not party to it, the Second Circuit in *Union Circulation* entertained the idea that the effects of the agreements are such that they might constitute *per se* violations of the Sherman Act. See 241 F.2d at 656, n. 1. For that circuit to consider applicability of the *per se* doctrine to the no-switching practice and this Court to hold that the same practice, as a matter of law, does not violate the Sherman Act indicates a conflict between the two. This, along with the Court's prior decision in *Nichols,* lead to the conclusion that the case at bar should be remanded to the District Court for a determination as to the effects of the no-switching agreement upon non-Bell operating companies and competing interconnect companies.

III

THE COURT'S ANALYSIS OF THE BLACKLISTING AGREEMENT IN *Radovich* ITSELF SUPPORTS A FINDING THAT THE SECOND AMENDED COMPLAINT STATES A CLAIM

The Court analyzes *Radovich* observing that the blacklist there was part of a conspiracy to boycott players of a competing football league and therefore was anticompetitive. The Court then concludes that since no third-party competitors of Bell System companies are alleged to have been affected by the agreement in the amended complaint, the reasoning of *Radovich* is inapplicable here.

Under the Court's own interpretation of *Radovich,* the *second amended* complaint states a cause of action. In *Radovich* the blacklist was enforced against a player who had played for an NFL team, the NFL being a party to the agreement, and then played for a team which was part of a competing league. In the instant case the blacklisting extends to any Bell System employee who subsequently works for a non-Bell operating company or a

competing non-Bell interconnect company. Although the blacklisting is enforced against former Bell System employees whether or not they work for such non-Bell operating or interconnect companies, it clearly encompasses those who work for non-Bell companies. As the second amended complaint alleges damage to such non-Bell companies, under the Court's own reasoning it states a cause of action.

Conclusion

Based on the foregoing, plaintiff-appellant requests that this Petition For Rehearing In Banc be granted.

Respectfully submitted,

/s/ Steven A. Taterka
Steven A. Taterka

200 West 86th St. #9M
New York, N.Y. 10024
212 799-7819

APPENDIX C

Steven A. Taterka
P.O. Box 971
Milwaukee, Wi. 53201
May 29, 1977

Hon. Thomas E. Fairchild
United States Court of Appeals
for the Seventh Circuit
219 S. Dearborn St.
Chicago, Ill. 60604

Re: *Taterka* v. *Wisconsin Telephone Co., Case* #76-1888

Dear Judge Fairchild:

I am writing to bring to your attention a petition for rehearing recently filed in connection with the above case. I am doing so because I believe the Court's order conflicts with its decision in *Nichols* v. *Spencer International Press, Inc.*, 371 F.2d 332, 2 ALR Fed 829 (7 Cir. 1967).

The suit challenges the legality, under the Sherman Act, of a "no-switching" agreement adhered to by Bell System telephone companies. Under the agreement Bell companies do not hire each other's employees for a period of six months following previous Bell System employment. In *Nichols* you wrote that the effects of adherence to a similar no-switching agreement were sufficient, as a matter of law, to constitute a restraint of trade. Since the panel's unpublished order in the case at bar holds, as a matter of law, to the contrary, it cannot be reconciled with *Nichols*. All parties are apparently in agreement that *Nichols* is the

controlling decision in this Circuit and as you authored that decision, I believe you are the most qualified to interpret it.

Thank you for your attention to this matter.

Respectfully,

/s/ Steven A. Taterka
Steven A. Taterka

encl.
cc: Wisconsin Telephone Co.

(June 1, 1977)

APPENDIX D

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Cause #76-1888

Steven A. Taterka, *Plaintiff-Appellant,*

v.

Wisconsin Telephone Company, *Defendant-Appellee.*

Motion for Publication of Order

Plaintiff-appellant, Steven A. Taterka, moves the Court pursuant to Circuit Rule 35(d)(3) for an order directing that its unpublished order of May 4, 1977, in the above-entitled action, be issued as a published opinion.

This motion is made on the following grounds:

Per Circuit Rule 35(c)(1)(ii), this case involves an issue of continuing public interest as evidenced by publication of the District Court's original order in:

394 F.Supp. 862
10 FEP Cases 966
1975-2 Trade Cases para. 60,462
10 EPD para. 10,338

and reference to that order in:

2 ALR Fed 839 (Supp. 1976).

Per Circuit Rule 35(c)(1)(ii), this case involves an issue of continuing public interest since the employment practice challenged in this action is engaged in by the Bell System, one of the nation's largest employers.

Per Circuit Rule 35(c)(1)(i), plaintiff-appellant believes the Court's order of May 4, 1977, changes an existing rule

of law as set forth in the Court's prior decision in *Nichols* v. *Spencer International Press, Inc.*, 371 F.2d 332, 2 ALR Fed 829 (7 Cir. 1967).

Per Circuit Rule 35(c)(1)(iv)(C), plaintiff-appellant believes the Court's order of May 4, 1977, creates a conflict with the Second Circuit decision in *Union Circulation Co.* v. *FTC*, 241 F.2d 652 (2 Cir. 1957).

Dated: June 2, 1977.

/s/ STEVEN A. TATERKA
Plaintiff-appellant

Steven A. Taterka
P.O. Box 971
Milwaukee, Wi. 53201
414 278-0040